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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MICHAEL N. SHERIDAN and
MARY A. SHERIDAN,
Petitioners,

v.

THE UNITED STATES

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF OF JOHN DOE ONE — JOHN DOE FORTY ONE (anonymous Hopi Indian Children) PLAINTIFFS IN THAT ACTION KNOWN AS JOHN DOE ONE, ET AL., v. THE UNITED STATES OF AMERICA NO. CIV 87-2110 PCT EHC, U.S. DISTRICT COURT FOR THE DISTRICT OF ARIZONA AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

Whether the intentional tort exception of the Federal Tort Claims Act bars all suits against the United States which allege negligent failure to prevent an intentional tort, including cases in which the injury results from the government's breach of an affirmative duty to protect Indian school children where the source of the government's duty to prevent the injury arises independent of its status as the assailant's employer.

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The forty-one Indian children through their counsel herein submit this AMICI Curiae Brief to urge the Court to reverse the majority decision below and affirm the dissenting opinion of Chief Judge Harrison L. Winter so that the claim of the minor plaintiffs for breach of duty on the part of the United States may not in any way be impaired.

INTEREST OF AMICI

The Polacca Day School on the Hopi Indian Reservation in Arizona is a primary school operated by the Bureau of Indian Affairs of the United States Department of the Interior. On the campus premises and immediately adjacent thereto are apartments and houses for purposes of providing housing for teachers and the principal of the school. In 1978 the Bureau of Indian Affairs employed John W. Boone to be a primary teacher at the Polacca Day School on the Hopi Indian Reservation. This particular individual was a sexual deviant — a pedophile prone to acts of perversion and obscenity with young boys. He was given a residence on the school property, which residence was approximately 120 feet from the playground, 160 feet from the cafeteria and 250 feet from the classrooms building.

John Boone was arrested by the F.B.I. and charged with child molesting on March 11, 1987. He entered a plea of guilty on April 28, 1987. He was sentenced to life imprisonment and now resides in a federal prison in North Carolina. John Boone molested and committed various acts of perversion and obscenity on and with young school boys for a period of approximately nine years. The misconduct generally occurred at the residence of Mr. Boone. A chart was obtained from his residence at the time of his arrest which contained more than 140 names of young boys. His acquaintance with the victims resulted from the fact that he was a teacher at their school.

All the plaintiffs filed Federal Tort Claims against the United States alleging injury by John W. Boone. After these claims were denied, forty-one of the victims commenced a civil action in the U.S. District Court for the District of Arizona known as John Doe One, et al., v. the United States of America, No. CIV 87-2110 PCT EHC.

A stay order has been sought of their case by the U.S. Attorney for Arizona on the grounds that this court's decision will control the case of the Polacca students.

SUMMARY OF ARGUMENT

The United States Government has both a common law and a statutory duty to provide security to Indian children attending a B.I.A. primary school on the Hopi Indian Reservation and to protect students from harm by pedophiles residing upon the school premises and employed as teachers.

John W. Boone was a teacher employed by the B.I.A., and he taught fourth grade at the Polacca Day School. The fact of employment itself is not controlling in reference to the duty imposed upon the United States. Employment is a factor which must be taken into consideration insofar as how and why he had access to these children. Another factor is that he was provided a residence wherein he was housed virtually on the school premises. Finally, the continuation of his employment and residency over a period of approximately nine years is likewise a significant factor in the consideration of the duty and negligence of the United States.

The liability of the United States is predicated upon a failure of the United States to carry out both a statutory and a common law duty to protect the minor plaintiffs. The breach of this duty to safeguard these school children resulted in foreseeable injury to children of a young age.

ARGUMENT

I. There is a common law duty imposed upon the United States pursuant to 28 U.S.C. Section 2674 that requires the United States through its agency, the Bureau of Indian Affairs, to protect school children attending school at a B.I.A. day school on the Hopi Indian Reservation from pedophiles and/or sexually deviant school teachers employed by the United States and housed by the United States on the school premises.

28 U.S.C. Section 2674, Liability of the United States, states in part as follows:

> "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same

manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

The State of Arizona has long recognized that a public school district is liable for its negligence in failing to exercise ordinary care which results in an injury to a student. *Chavez v. Tolleson Elementary School District*, 595 P.2d 1017 (Ariz. 1975).

Generally speaking, an injured party may recover from an employer if the person was injured by a negligently hired employee or a negligently retained employee. *Ponticas v. K.M.S. Investments*, 331 N.W. 2d 907 (Minn. 1983); a child molestation case, discussed the prevailing law and stated,

> "Liability is predicated on the negligence of an employer in placing a person with known propensities, or propensities which should have been discovered by reasonable investigation, in an employment position in which, because of the circumstances of the employment, it should have been foreseeable that the hired individual posed a threat of injury to others.
>
> * * *
>
> We can ascertain no substantial difference in imposing a duty on an employer to use reasonable care in the initial hiring from his duty to use that care in the retention of an employee." 331 N.W.2d at p. 911.

The United States has a clear common law duty to exercise reasonable care in the employment of teachers and to not employ a pedophile. The government must exercise reasonable care to remove such individuals from employment and from residing upon the school premises.

II. There is a statutory duty imposed upon the United States pursuant to the United States Code and Code of Federal Regulations that requires the United States through its agency, the Bureau of Indian Affairs, to protect school children attending school at a B.I.A. day school on the Hopi Indian Reservation from pedophiles and/or sexually deviant school teachers employed by the United States and housed by the United States on the school premises.

There are numerous federal statutes creating a duty on the part of the United States to provide appropriate protection for Indian children attending B.I.A. schools on the reservation. In order to appreciate the intent of these statutes and the regulations which create this duty, we quote as follows:

> 25 U.S.C. Section 174 (Superintendence by President over tribes west of Mississippi).
>
> 25 U.S.C. Section 231 (Enforcement of State laws affecting health and education; entry of State employees on Indian lands).
>
> 25 U.S.C. Section 271 (Employment of instructors for Indians), provides in part:
>
> "The President may, in every case where he shall judge improvement in the habits and condition of such Indians practicable, . . . employ capable persons of good moral character to instruct them . . . and for teaching their children in reading, writing and arithmetic, and performing such other duties as may be enjoined according to such instructions and rules as the President may give and prescribe for the regulation of their conduct, in the discharge of their duties . . ."
>
> 25 U.S.C. Section 272 (Superintendent of Indian schools).
>
> 25 U.S.C. Section 292 (Suspension or discontinuance of schools).
>
> 25 U.S.C. Section 295 (Supervision of expenditure of appropriations for school purposes).
>
> 20 U.S.C. Section 1221f (Office of Indian Education), specifically provides:

"(a) There is hereby established, in the Office of Education, a bureau to be known as the 'Office of Indian Education' . . ."

25 U.S.C. Section 1902 (Congressional declaration of policy), provides in part:

"The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for removal of Indian children from their families . . ."

25 U.S.C. Section 2005 (Facilities construction), provides in part:

"The Secretary shall immediately begin to bring all schools, dormitories, and other facilities operated by the Bureau or under contract with the Bureau in connection with the education of Indian children into compliance with all applicable Federal, tribal, or State health and safety standards, whichever provide greater protection . . ."

25 U.S.C. Section 2006 (Bureau of Indian Affairs education functions), provides in part:

"The Secretary shall vest in the Assistant Secretary for Indian Affairs all functions with respect to formulation and establishment of policy and procedure, and supervision of programs and expenditures of Federal funds for the purpose of Indian education administered by the Bureau . . ."

* * *

(c) Functions of education personnel in Bureau agencies under direction and supervision of Director . . .

Education personnel located in Bureau agencies, who are under the direction and supervision of the Director of the Office, in accordance with the first sentence of subsection (b) of this section, shall —

(1) monitor and evaluate Bureau education programs, and

(2) provide technical and coordinating assistance in areas such as procurement, contracting, budgeting, personnel, and curriculum."

25 U.S.C. Section 2007 (Policies and procedures for implementation of transferred administrative functions; establishment, etc.), specifically provides:

"Within six months after November 1, 1978, the Secretary shall establish and publish in the Federal Register the policies and procedures which are necessary to implement the transfer of functions made under section 2006 of this title."

Pursuant to the mandate of Congress, certain written policies pertaining to Indian education were thereafter enacted and they can be found in 25 C.F.R. Part 32 — INDIAN EDUCATION POLICIES.

25 C.F.R. Section 32.1 Purpose and scope, provides in part:

"The purpose of this part is to state the policies to be followed by all schools and education programs under the jurisdiction of the Bureau of Indian Affairs . . ."

25 C.F.R. Section 32.2 Definitions, provides in part:

". . . (i) 'Day School' means a Bureau school offering an academic program and certain support services such as counseling, food, transportation, etc., but excluding residential care."

25 C.F.R. Section 32.3 Mission statement, provides in part:

". . . it is the responsibility and goal of the Federal government to provide comprehensive education programs and services for Indians . . . there is no resource more vital to such Tribes and villages than their young people and the Federal Government has a direct interest, as trustee, in protecting Indian . . . children, including their education. The mission of the Bureau of Indian

Affairs, Office of Indian Education Programs, is to provide quality education opportunities from early childhood through life in accordance with the Tribes' needs for cultural and economic well-being in keeping with the wide diversity of Indian Tribes . . . The Bureau shall manifest consideration of the whole person, taking into account the spiritual, mental, physical and cultural aspects of the person within family and Tribal . . . village contexts."

25 C.F.R. Section 32.4 Policies, provides in part:

"In carrying out its Education mission, the Assistant Secretary for Indian Affairs . . . shall:

* * *

(b) *Student rights.* Ensure the constitutional, statutory, civil and human rights of all Indian . . . students . . .

(e) *Respect for family.* Promote, respect and defend the cohesiveness and integrity of the family, in Tribal . . . community, as they relate to the educational and social prerogatives of the Tribes

* * *

(s) *Planning, maintenance and use of facilities.*

(1) Ensure that the needs of the students and Tribal . . . community will receive first priority in the planning, design, construction, operation and maintenance of Bureau schools and residential facilities, rather than other considerations, such as ease of maintenance, and that these facilities assure a supportive environment for learning, living and recreation.

(2) Maintain all school and residential facilities to meet appropriate Tribal, State or Federal safety, health and child care standards. If a conflict exists in these standards, the Federal standard shall be followed; in the absence of a Federal standard, the Tribal standard shall be followed. In the case of conflict, any such Tribal health or safety standards shall be no greater than any otherwise applicable State standard."

25 C.F.R. Part 42, STUDENT RIGHTS AND DUE PROCESS PROCEDURES, provides in part:

"Section 42.1 Purpose.

The regulations in this part govern establishing programs of student rights and due process procedures in Bureau of Indian Affairs schools and in schools that are operating under contract with the Bureau of Indian Affairs.

* * *

Section 42.3, Rights of the individual student.

Individual students at Bureau of Indian Affairs schools have, and shall be accorded, the following rights:

(a) The right to an education.

(b) The right to be free from unreasonable search and seizure of their person and property, to a reasonable degree of privacy, and to a safe and secure environment."

25 U.S.C. Section 1901, Congressional findings, states in part,

"Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds —

* * *

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who

are members of or are eligible for membership in an Indian tribe . . ."

It is apparent there is a statutory duty on the part of the United States to protect Indian children attending B.I.A. administered schools from foreseeable harm. It is obvious that under both the common law and statutory duty, the Federal government must use reasonable care to insure that sexual deviants or pedophiles are not employed as school teachers, nor that they are retained as teachers if by chance they are employed, nor permitted to reside on school premises.

We know from psychiatry there is a high probability that a pedophile will molest and injure a young child.

> "The essential feature of this disorder (pedophilia) is recurrent, intense, sexual urges and sexually arousing fantasies, of at least six months' duration involving sexual activity with a prepubescent child. The person has acted on these urges, or is markedly distressed by them. The age of the child is generally 13 or younger . . .
>
> * * *
>
> People with this disorder who act on their urges with children may limit their activity to undressing the child and looking, exposing themselves, masturbating in the presence of the child, or gentle touching and fondling of the child. Others, however, perform fellatio or cunnilingus on the child or penetrate the child's vagina, mouth, or anus with their fingers, foreign objects, or penis, and use varying degrees of force to achieve these ends . . .
>
> * * *
>
> The course is usually chronic, especially in those attracted to boys. The frequency of pedophilic behavior often fluctuates with psychosocial stress. The recidivism rate for people with Pedophilia involving a preference for the same sex is roughly twice that of those who prefer the opposite sex." DSM-III-R, (American Psychiatric Association, Wash., D.C., 1987.)

Clearly, a pedophile employed as a teacher at the Polacca Day School is a clear and present danger to any child attending that school.

The plaintiffs from the Polacca Day School do not rest their claims upon various acts of child molesting, ergo, individual assaults. These are claims of the failure of the United States to perform its duty to protect school children from a known injury.

In *Shearer v. United States of America*, 723 Fed. 2d 1102 (3rd Cir. 1984), it was stated by the Court of Appeals,

> "The FTCA does not necessarily bar a cause of action in negligence, even if the injury is directly caused by the assault and battery of a government employee. The FTCA simply requires that the intentional tort must 'have its roots in government negligence.' " 723 F. 2d at p. 1106.

Shearer later was reviewed by the U.S. Supreme Court, *United States v. Shearer*, 473 U.S. 52, 87 L. Ed. 2d 38, 105 S. Ct. 3039, (1985). We submit it is factually distinguishable from the claims of the Hopi School children. Justice Burger confirms a difference in his opinion.

> ". . . By whatever name it is called, it is a decision of command. The plaintiffs in Feres and Stencel Aero Engineering did not contest the wisdom of broad military policy; nevertheless, the Court held that their claims did not fall within the Tort Claims Act because they were the *type* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness. Similarly, respondents attempt to hale Army officials into court to account for their supervisions and discipline . . . must fail." 87 L.Ed. 2d, at p. 45.

The duty to protect Indian children from teachers who are pedophiles in no way involves "sensitive military affairs." Accordingly, the U.S. Supreme Court opinion in *Shearer* is not controlling.

The Ninth Circuit recently considered a case involving a school teacher on the Navajo Reservation who kidnapped and sodomized some young boys. The opinion of *Bennett v. United States of America*, 803 F. 2d 1502 (9th Cir. 1986), contains appropriate rationale.

> "... the policy underlying subsection 2680 (h) was to insulate the government from liability for acts it was powerless to prevent or which would make defense of a lawsuit unusually difficult ... This claim is likewise not founded upon *respondeat superior*, but upon the same kind of negligent supervision, after notice, ...
>
> * * *
>
> ... To construe the assault and battery exception to defeat claims based on negligence when the negligence amounts to almost reckless disregard in the hiring and the placement of a known sex offender in charge of children would violate 28 U.S.C. Section 2674 (1982) by treating the federal government differently from private entities hiring and supervising teachers." 803 F. 2d at p. 1504.

We would also direct this Court to the dissent by Judge Harrison L. Winter in *Sheridan v. United States of America*, 823 F. 2d 820 (4th Cir. 1987),

> "... I think that the government should be held subject to suit in all cases where its alleged liability is independent of the assailant's employment status — i.e., where a court can isolate a government duty and source of negligence that is based on something other than the fortuitous circumstance that the government happens to be the assailant's employer." 823 F. 2d at p. 823.
>
> "... The test to be applied is straightforward: would the government be liable if the assailant was not a government employee? If yes, Section 2680 (h) is not applicable." 823 F. 2d at p. 823.

CONCLUSION

For the foregoing reasons, it is requested that the majority judgment and opinion of the Court of Appeals be reversed and the dissenting opinion of Chief Judge Harrison L. Winter be adopted and confirmed as the appropriate law of this case.

Respectfully submitted,

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